

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 17-574V

Filed: December 2, 2022

* * * * *

PAUL DERBER *and* CATHERINE
DERBER, *as parents on behalf of*
D.D., a minor,

Petitioners,

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

* * * * *

UNPUBLISHED

Attorneys' Fees and Costs

Danielle A. Strait, Maglio Christopher and Toale, PA, Seattle, WA, for petitioners.
Claudia B. Gangi, U.S. Department of Justice, Washington, DC, for respondent.

DECISION ON ATTORNEYS' FEES AND COSTS¹

Roth, Special Master:

On April 28, 2017, Paul and Catherine Derber ("petitioners") filed a petition on behalf of their minor child, D.D., pursuant to the National Vaccine Injury Compensation Program.² Petitioners alleged that D.D. developed chronic inflammatory demyelinating polyneuropathy after receiving an influenza vaccination on November 9, 2014. *See* Petition, ECF No. 1. On November 23, 2021, the parties filed a stipulation, which the undersigned adopted as her decision awarding compensation on the same day. (ECF No. 68).

¹ The undersigned intends to post this Decision on the United States Court of Federal Claims' website. **This means the decision will be available to anyone with access to the Internet.** In accordance with Vaccine Rule 18(b), petitioners have 14 days to identify and move to redact medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, the undersigned agrees that the identified material fits within this definition, the undersigned will redact such material from public access. Because this unpublished ruling contains a reasoned explanation for the action in this case, the undersigned is required to post it on the United States Court of Federal Claims' website in accordance with the E-Government Act of 2002. 44 U.S.C. § 3501 note (2012) (Federal Management and Promotion of Electronic Government Services).

² National Childhood Vaccine Injury Act of 1986, Pub L. No. 99-660, 100 Stat. 3755.

On May 26, 2022, petitioners filed an application for final attorneys' fees and costs. ("Fees App.") (ECF No. 73). Petitioners request total attorneys' fees and costs in the amount of \$94,258.55, representing \$57,181.50 in attorneys' fees, \$27,842.49 in attorneys' costs, and \$9,234.56 in costs personally incurred by petitioners. Fees App. at 1. Respondent responded to the motion on June 10, 2022, stating "Respondent is satisfied the statutory requirements for an award of attorneys' fees and costs are met in this case" and requesting that the undersigned "exercise her discretion and determine a reasonable award for attorneys' fees and costs." Response at 2 (ECF No. 75). Petitioners filed a reply on July 14, 2022, reiterating their belief that the requested attorneys' fees and costs are reasonable. (ECF No. 76).

This matter is now ripe for consideration.

I. Legal Framework

The Vaccine Act permits an award of "reasonable attorneys' fees" and "other costs." § 15(e)(1). If a petitioner succeeds on the merits of his or her claim, the award of attorneys' fees is automatic. *Id.*; see *Sebelius v. Cloer*, 133 S. Ct. 1886, 1891 (2013). However, a petitioner need not prevail on entitlement to receive a fee award as long as the petition was brought in "good faith" and there was a "reasonable basis" for the claim to proceed. § 15(e)(1). Here, because petitioners were awarded compensation pursuant to a stipulation, they are entitled to a final award of reasonable attorneys' fees and costs.

The Federal Circuit has endorsed the use of the lodestar approach to determine what constitutes "reasonable attorneys' fees" and "other costs" under the Vaccine Act. *Avera v. Sec'y of Health & Human Servs.*, 515 F.3d 1343, 1349 (Fed. Cir. 2008). Under this approach, "an initial estimate of a reasonable attorneys' fees" is calculated by "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Id.* at 1347–48 (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). That product is then adjusted upward or downward based on other specific findings. *Id.*

Special masters have substantial discretion in awarding fees and may adjust a fee request *sua sponte*, apart from objections raised by respondent and without providing petitioners with notice and opportunity to respond. See *Sabella v. Sec'y of Health & Human Servs.*, 86 Fed. Cl. 201, 209 (2009). Special masters need not engage in a line-by-line analysis of petitioner's fee application when reducing fees. See *Broekelschen v. Sec'y of Health & Human Servs.*, 102 Fed. Cl. 719, 729 (2011).

II. Discussion

A. Reasonable Hourly Rate

A "reasonable hourly rate" is defined as the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Avera*, 515 F.3d at 1348 (quoting *Blum*, 465 U.S. at 896 n.11). In general, this rate is based on "the forum rate for the District of Columbia" rather than "the rate in the geographic area of the practice of petitioner's attorney." *Rodriguez v. Sec'y of Health & Human Servs.*, 632 F.3d 1381, 1384 (Fed. Cir. 2011)

(citing *Avera*, 515 F.3d at 1349). There is a “limited exception” that provides for attorney's fees to be awarded at local hourly rates when “the bulk of the attorney's work is done outside the forum jurisdiction” and “there is a very significant difference” between the local hourly rate and forum hourly rate. *Id.* This is known as the *Davis County* exception. See *Hall v. Sec’y of Health & Human Servs.*, 640 F.3d 1351, 1353 (2011) (citing *Davis Cty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. U.S. EPA*, 169 F.3d 755, 758 (D.C. Cir. 1999)).

For cases in which forum rates apply, *McCulloch* provides the framework for determining the appropriate hourly rate range for attorneys' fees based upon the attorneys' experience. See *McCulloch v. Sec’y of Health & Human Servs.*, No. 09–293V, 2015 WL 5634323 (Fed. Cl. Spec. Mstr. Sept. 1, 2015). The Office of Special Masters has accepted the decision in *McCulloch* and has issued a Fee Schedule for subsequent years.³

Petitioners requests the following hourly rates for the work of their counsel, Ms. Danielle Strait: \$300.00 per hour for work performed in 2016, \$307.00 per hour for work performed in 2017, \$322.00 per hour for work performed in 2018, \$340.00 per hour for work performed in 2019, \$370.00 per hour for work performed in 2020, \$395.00 per hour for work performed in 2021, and \$415.00 per hour for work performed in 2022. These rates are consistent with what counsel has previously been awarded for their Vaccine Program work and the undersigned finds them to be reasonable herein for work performed in the instant case. However, the billing records indicate that Ms. Strait billed a small amount of time (7.5 hours) in 2017 at \$320.00 per hour, a higher hourly rate than she is typically awarded. The undersigned will compensate these hours at her standard rate of \$307.00 per hour, resulting in a reduction of \$97.50.

B. Hours Reasonably Expended

Attorneys' fees are awarded for the “number of hours reasonably expended on the litigation.” *Avera*, 515 F.3d at 1348. Counsel should not include in their fee requests hours that are “excessive, redundant, or otherwise unnecessary.” *Saxton ex rel. Saxton v. Sec’y of Health & Human Servs.*, 3 F.3d 1517, 1521 (Fed. Cir. 1993) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). “Unreasonably duplicative or excessive billing” includes “an attorney billing for a single task on multiple occasions, multiple attorneys billing for a single task, attorneys billing excessively for intra office communications, attorneys billing excessive hours, [and] attorneys entering erroneous billing entries.” *Raymo v. Sec’y of Health & Human Servs.*, 129 Fed. Cl. 691, 703 (2016). While attorneys may be compensated for non-attorney-level work, the rate must be comparable to what would be paid for a paralegal or secretary. See *O’Neill v. Sec’y of Health & Human Servs.*, No. 08–243V, 2015 WL 2399211, at *9 (Fed. Cl. Spec. Mstr. Apr. 28, 2015). Clerical and secretarial tasks should not be billed at all, regardless of who performs them. See, e.g., *McCulloch*, 2015 WL 5634323, at *26. Hours spent traveling are ordinarily compensated at one-half of the normal hourly attorney rate. See *Scott v. Sec’y of Health & Human Servs.*, No. 08–756V, 2014 WL 2885684, at *3 (Fed. Cl. Spec. Mstr. June 5, 2014) (collecting cases). And “it is inappropriate for counsel to bill time for educating themselves about basic aspects of the Vaccine

³ The 2015-2020 Fee Schedules can be accessed at <http://www.cofc.uscourts.gov/node/2914>. The hourly rates contained within the schedules are updated from the decision in *McCulloch v. Sec’y of Health & Human Servs.*, No. 09-293V, 2015 WL 5634323 (Fed. Cl. Spec. Mstr. Sept. 1, 2015).

Program.” *Matthews v. Sec’y of Health & Human Servs.*, No 14–1111V, 2016 WL 2853910, at *2 (Fed. Cl. Spec. Mstr. Apr. 18, 2016). Ultimately, it is “well within the Special Master's discretion to reduce the hours to a number that, in [her] experience and judgment, [is] reasonable for the work done.” *Saxton*, 3 F.3d at 1522. In exercising that discretion, special masters may reduce the number of hours submitted by a percentage of the amount charged. *See Broekelschen*, 102 Fed. Cl. at 728–29 (affirming the Special Master's reduction of attorney and paralegal hours); *Guy v. Sec’y of Health & Human Servs.*, 38 Fed. Cl. 403, 406 (1997) (same).

Upon review, the overall hours spent on this matter appear to be reasonable. The undersigned has reviewed the billing entries and finds that the billing entries adequately describe the work done on the case and the amount of time spent on that work. None of the entries appear objectionable, nor has respondent identified any entries as objectionable. Accordingly, petitioners are entitled to a final award of attorneys’ fees in the amount of \$57,084.00.

C. Reasonable Costs

Like attorneys’ fees, a request for reimbursement of attorneys’ costs must be reasonable. *Perreira v. Sec’y of Health & Human Servs.*, 27 Fed. Cl. 29, 34 (Fed. Cl. 1992). Petitioners request a total of \$27,842.49 in costs for acquisition of medical records, the Court’s filing fee, postage, and work performed by petitioners’ life care planner. Fees App. Ex. 2. The undersigned finds these costs largely reasonable and supported by the necessary documentation. However, it appears that the life care planner billed their full hourly rate for travel without any indication that case work was being performed during that time. Fees App. Ex. 2 at 46. The undersigned shall reduce the final award of attorneys’ costs by \$700.00 to account for this issue.

Additionally, pursuant to General Order No. 9, petitioners have indicated that they have personally incurred costs totaling \$9,234.56, comprised of a bond premium required to be named co-guardian’s of D.D.’s compensation, attorneys’ fees incurred for the work of their guardianship attorney, and future attorneys’ fees and costs to maintain and discharge D.D.’s guardianship. Petitioners have provided documentation supporting these costs and they shall also be fully reimbursed.

III. Conclusion

In accordance with the foregoing, petitioners’ motion for attorneys’ fees and costs is **GRANTED**. The undersigned hereby awards petitioners **\$93,362.05** to be disbursed as follows:

- 1) **a lump sum of \$84,226.49, representing reimbursement for petitioners’ attorneys’ fees and costs, in the form of a check payable jointly to petitioners and mctlaw;**
- 2) **a lump sum of \$760.00, representing reimbursement for the bond premium, in the form of a check payable jointly to petitioners and mctlaw;**

- 3) a lump sum of \$4,041.56, representing reimbursement for guardianship counsel, in the form of a check payable jointly to petitioners and Ruloff, Swain, Haddad, Morecock, Talbert and Woodward, P.C.; and
- 4) a lump sum of \$4,334.00, representing reimbursement for future guardianship expenses, in the form of a check payable to petitioners as Co-Guardians of the Estate of David Derber, Minor.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court shall enter judgment in accordance herewith.⁴

IT IS SO ORDERED.

s/Mindy Michaels Roth

Mindy Michaels Roth
Special Master

⁴ Entry of judgment can be expedited by each party's filing of a notice renouncing the right to seek review. Vaccine Rule 11(a).